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No. 87-1286

In The

Supreme Court of the United States

October Term, 1987

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,
Petitioners,

v.

FREDERICK R. CALLOWHILL,
Respondent,

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,
Petitioners,

v.

WALTER J. SMALL,
Respondent,

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,
Petitioners,

v.

WILLIAM F. MARTIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN E. COMBS, ESQUIRE*
GARY C. BENDER, ESQUIRE
Attorneys for Respondents

Of Counsel:
CRAMP, D'IORIO, McCONCHIE & FORBES, P.C.
215 N. Olive Street
P.O. Box 568
Media, PA 19063
(215) 565-1700
**Attorney of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE THIRD CIRCUIT COURT OF APPEALS TOLLED THE STATUTE OF LIMITATIONS FOR FILING A CIVIL ACTION IN THESE CASES SOLELY BECAUSE THE EMPLOYER FAILED TO POST THE NOTICE REQUIRED BY 29 U.S.C., § 627?

II. WHETHER THE THIRD CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE ADMINISTRATIVE STATUTE OF LIMITATIONS UNDER 29 U.S.C., SEC. 626(d) WAS TOLLED WHERE THE EMPLOYER FAILED TO POST THE REQUIRED NOTICE UNDER 29 U.S.C., § 627 EVEN THOUGH THE EMPLOYER POSTED A PENNSYLVANIA HUMAN RELATIONS COMMISSION NOTICE?

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REASONS FOR DENYING WRIT

I. WHETHER THE THIRD CIRCUIT COURT OF APPEALS TOLLED THE STATUTE OF LIMITATIONS FOR FILING A CIVIL ACTION IN THESE CASES SOLELY BECAUSE THE EMPLOYER FAILED TO POST THE NOTICE REQUIRED BY 29 U.S.C., § 627?

The Petitioner, Allen-Sherman-Hoff implies in its petition for a writ of certiorari that the reason the Third Circuit Court of Appeals tolled the statute of limitations for filing a civil action in these cases was *solely* because the employer failed to post the notice required by 29 U.S.C., § 627. The question presented by the Petitioner is entirely misleading and completely misstates the reasons why the Appellate Court tolled the statute of limitations in these cases. In tolling the statute of limitations, the Third Circuit in its opinion examined a number of factors which were specifically unique to the cases in question. The specific facts and circumstances which the Court weighed in making its equitable determination are clearly set forth below in the Court's Opinion:

> "We think it important to point out the limitations of our opinion. Our result is based on the coincidence of the circumstances that: (1) the district court did not err in denying defendants' original motions to dismiss; (2) the charges were filed promptly with the EEOC after plaintiffs retained counsel; (3) the charges were filed at a time when the 60-day deferral provisions of 29 U.S.C., § 626(d) made it too late for plaintiffs properly to file their district court complaints within two years after the occurrence of the alleged unlawful action; and (4) the defendants were aware of the charges within two years of the accrual of the plaintiffs' causes of action." *Callowhill v. Allen-Sherman-Hoff Co., Inc.*, 832 F.2d 269, 274 (3d Cir. 1987) (A-12)

The Third Circuit's opinion clearly indicates that it was the combination of all of these factors which led to their result rather than merely the failure of the employer to post the required notice under 29 U.S.C., § 627 as Petitioner Allen-Sherman-Hoff alleged in its petition for a writ of certiorari. Whether to toll a statutory period is determined on a case-by-case basis, depending on the equities of the situation. *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483, 1485 (11th Cir. 1984). The Third Circuit opinion in our case examined all of the facts peculiar and unique to the present cases and after weighing the equities involved, held that the statute of limitations should be tolled and the plaintiffs' complaints be considered timely. Thus, there is no intercircuit conflict in this case as alleged by Petitioner Allen-Sherman-Hoff since the Third Circuit did not toll the statute of limitations *solely* because the employer failed to post the notice required by 29 U.S.C., § 627.

II. WHETHER THE THIRD CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE ADMINISTRATIVE STATUTE OF LIMITATIONS UNDER 29 U.S.C., § 626(d) WAS TOLLED WHERE THE EMPLOYER FAILED TO POST THE REQUIRED NOTICE UNDER 29 U.S.C., § 627 EVEN THOUGH THE EMPLOYER POSTED A PENNSYLVANIA HUMAN RELATIONS COMMISSION NOTICE?

In an earlier stage in the procedural history of these cases, Petitioner-Defendant Allen-Sherman-Hoff filed a motion to dismiss the cases based upon the plaintiffs' failure to timely file their administrative charges with the EEOC under 29 U.S.C., § 626(d). The district court denied defendants' motion to dismiss because of Allen-Sher-

man-Hoff's failure to post the notice required by 29 U.S.C., § 627. In denying the motions to dismiss, the district court relied on *Bonham v. Dresser Industries Inc.*, 569 F.2d 187 (3d Cir. 1977), Cert denied, 439 U.S. 821 (1978). The *Bonham* case held that the employer's failure to post the notice required by 29 U.S.C. § 627 will result in tolling the statute of limitations for filing an administrative claim with the EEOC, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the ADEA. 569 F.2d at 193. As the Third Circuit opinion noted, the facts in our cases were very similar to *Bonham* in that each plaintiff filed an affidavit stating he was unaware of his legal rights under federal and state employment discrimination statutes while employed by Allen-Sherman-Hoff and that he first became aware of these rights on or about October 4, 1985 upon consultation with an attorney. *Callowhill v. Allen-Sherman-Hoff Co., Inc.*, 832 F.2d 269, 272 (3d Cir. 1987) (A-9).

Petitioner Allen-Sherman-Hoff now asserts that by posting the Pennsylvania Human Relations Commission notice they gave "constructive notice" to each of the plaintiffs with respect to their legal rights under the federal statute (ADEA) as set forth in *DeBrunner v. Midway Equipment Co.*, 803 F.2d 950 (8th Cir. 1986). Petitioner Allen-Sherman-Hoff goes on to say that by posting the Pennsylvania Human Relations Commission notice, they gave plaintiffs the means of acquiring knowledge with respect to their federal rights under the ADEA. This allegation by Allen-Sherman-Hoff is a factual conclusion which had been decided in favor of the plaintiffs by the

Third Circuit (A-9, footnote 3). Moreover, the facts of the *DeBrunner* case are inapplicable to the matter at hand since in *DeBrunner*, the individual had actually sought advice from the EEOC prior to her discharge. In the present cases, the plaintiffs' affidavits indicated that they were totally unaware of any anti-discrimination laws and procedures (See A-9, footnote 3). In fact, the Third Circuit stated that if the employee did have full knowledge of the anti-discrimination laws and procedures, then they would not be entitled to a tolling of any limitation period merely because the notice was not posted, as the employer's failure to post the notice would not have prejudiced the employee (See A-9, footnote 3). This is in accord with the cases cited by the petitioner (*Kazanzas v. Walt Disney World Company*, 704 F.2d 1527 (11th Cir.), cert. denied, 464 U.S. 982 (1983)) which indicates that you must examine each case on its particular facts to determine if tolling is warranted.

Also, Respondents dispute the Petitioner Allen-Sherman-Hoff's factual allegations that by posting the Pennsylvania Human Relations Commission (PHRC) notice, the plaintiffs had "constructive notice" and thus should be charged with actual knowledge of their rights under the ADEA or the means of acquiring such knowledge as set forth in *DeBrunner*. First of all, there are substantial differences between the PHRC notice and the EEOC notice, not the least of which is that the PHRC notice extends protection to those between the ages of forty and sixty-two (as opposed to age 70 for the EEOC notice) and provides for completely different time periods and locations for filing a complaint. The PHRC complaint must be filed within ninety days and thus, an employee

who is beyond the ninety days may not contact the PHRC because he is beyond the filing period even though he could timely file with the EEOC since their filing period in a deferral state such as Pennsylvania is three hundred days. 29 U.S.C. § 626(d) (A-5). It is interesting to note that one of the plaintiffs, namely, William Martin, was age sixty-three at the time of his firing and thus he could certainly conclude that he had no cause of action as set forth in the PHRC notice since the age limit is sixty-two. Thus, Petitioner Allen-Sherman-Hoff's assertion that the posting of the PHRC notice was the equivalent of the EEOC notice with respect to advising the plaintiffs of their rights under the federal statute (ADEA) is entirely without merit.

Furthermore, if this Court would have to examine each and every notice that an employer may post to determine if that particular notice was sufficient under the current guidelines and law of the EEOC in order to advise the employees of their rights under the ADEA then the Courts would be flooded with cases each dependent upon the particular wording of the notice in question. For this reason 29 U.S.C., § 627 specifically states that the notice must be prepared or approved by the EEOC setting forth information as the Commission deems appropriate to effectuate the purposes of the Act. Also, this may be one reason why both the District Court and the Third Circuit held in these cases that the posting of the PHRC notice did not comply with 29 U.S.C., § 627 and ultimately tolled the *administrative* statute of limitations for filing a charge with the EEOC.

Thus, if the Court were to grant certiorari to determine whether a particular notice was sufficient in order to

comply with the EEOC regulations, then this would cause every litigant to seek review of their particular notice and result in numerous fact-sensitive decisions. As already stated, the issue of tolling the administrative statute of limitations was decided based upon the *Bonham* decision and the particular facts set forth in these cases. The Supreme Court has made it clear that it does not grant certiorari to review facts. *Texas v. Mead*, 465 U.S. 1041 (1984). In addition, certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Court of Appeals. *Rice v. Sioux City Memorial Parks Cemetary, Iowa*, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955). In these particular cases, there is no conflict between the circuits because any differences reflect a difference in the assessment of facts and not a "real and embarrassing conflict of opinion and authority between the Court of Appeals that is a matter of public importance." *Rice*, supra. The Third Circuit opinion clearly indicates it is dependent upon the unique and particular set of facts and circumstances presented in these cases (A-10, 11, 12).

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

/s/ Steven E. Combs
STEVEN E. COMBS, ESQUIRE
GARY C. BENDER, ESQUIRE
Attorneys for Respondents
Frederick R. Callowhill,
Walter J. Small and
William F. Martin

DATED: February 27, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1034, 87-1169 and 87-1170

FREDERICK R. CALLOWHILL,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INC.

WALTER J. SMALL,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INCORPORATED

WILLIAM F. MARTIN,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INCORPORATED

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civ. Nos. 85-7081, 85-7077 and 85-7080)

Argued October 1, 1987

BEFORE: SEITZ, GREENBERG and HUNTER,
Circuit Judges

(Filed November 4, 1987)

RALPH B. D'ORIO
GARY C. BENDER (Argued)
CRAMP, D'IORIO, McCONCHIE
& FORBES
215 N. Olive Street
P.O. Box 568
Media, Pa. 19063

Attorneys for Appellants

JUDITH E. HARRIS (Argued)
HARRIS & KAHN
1600 Market Street
Suite 1416
Philadelphia, Pa. 19103

Attorneys for Allen-Sherman-Hoff Company, Inc. and Ecolaire, Incorporated

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

Plaintiffs Frederick R. Callowhill, Walter J. Small, and William F. Martin appeal from summary judgments entered in the district court in favor of defendants Allen-Sherman-Hoff Company, Inc. and Ecolaire, Inc., dismissing their separate complaints under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The grounds for granting the motions were that the cases are barred by the statute of limitations under the ADEA which requires that cases be filed within two years of the

accrual of a cause of action, or three years if the violations are willful. 29 U.S.C. § 626(e)(1); 29 U.S.C. § 255 (a). Plaintiffs alleged that they were discharged by their employer, Allen-Sherman-Hoff, because of age. Ecolaire was joined as a defendant because Allen-Sherman-Hoff is one of its divisions. It is undisputed that each plaintiff was advised on or about November 18, 1983 that his last day of work would be December 9, 1983 and that none worked for Allen-Sherman-Hoff after the latter date.

We separately set forth additional material facts developed in each case on the motions for summary judgment. Callowhill, who was born November 7, 1921, was employed by Allen-Sherman-Hoff on June 8, 1979 as a manager of the International Operations Group responsible for all sales activities in the United States and Canada. He was told that he was being discharged because of a departmental reorganization. While Callowhill had "suspicions" that his discharge was because of age, it was not until almost two years later, when he talked to other former employees of Allen-Sherman-Hoff, that he concluded the corporation had discriminated against older employees. Accordingly, he consulted an attorney on or about October 4, 1985 and on October 8, 1985 filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) in Philadelphia. Notice of the charge was served on Allen-Sherman-Hoff on October 30, 1985 and on December 9, 1985 Callowhill brought this action in the district court.

Small, who was born on February 9, 1922, joined Allen-Sherman-Hoff in January 1948 and in early January 1974 became manager of its renewal parts department. The com-

pany advised him that his discharge was necessary because of economic reasons. While Small subsequently wondered whether the introduction of a new pension plan made it advantageous for Allen-Sherman-Hoff to discharge him because of his age, he did not consult an attorney until after he was told in September 1985 that older employees had been terminated by Allen-Sherman-Hoff even though there was work for them. He consulted an attorney on or about October 4, 1984 and on October 11, 1985 filed a Charge of Discrimination with the EEOC. Notice of the charge was served on Allen-Sherman-Hoff on October 31, 1985 and on December 9, 1985 Small brought this action in the district court.

Martin, who was born on June 14, 1920, was hired by a predecessor corporation to Allen-Sherman-Hoff in 1941 as a payroll clerk. He began working for Allen-Sherman-Hoff in 1976 as a sales correspondent and in 1981 was given the added responsibility of being a pricing specialist. Martin was told he was being discharged because of a departmental reorganization and economic conditions. It was not until he had a discussion with Small in September 1985 that he considered his age might have been a factor in the decision to terminate him. On or about October 4, 1985 he consulted with counsel and he filed a Charge of Discrimination with the EEOC on October 15, 1985. Notice of the charge was served on Allen-Sherman-Hoff on October 30, 1985 and December 9, 1985 Martin brought this action in the district court.

It is undisputed from the records before us that Allen-Sherman-Hoff never posted the notice required by 29 U.S.C. § 627 to advise its employees of their rights under

the ADEA. It appears, however, though plaintiffs claim not to have seen them, that it posted notices from the Pennsylvania Human Relations Commission dealing with employees' rights under Pennsylvania anti-discrimination laws and that at about the time plaintiffs commenced their actions in the district court, they also filed complaints with the Pennsylvania Commission.

Prior to moving for summary judgment, defendants filed, in all three cases, motions to dismiss the complaints for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Defendants asserted that the actions were barred by plaintiff's failure to file timely administrative charges with the EEOC under 29 U.S.C. § 626(d) which requires, as a prerequisite to a district action, that administrative charges be filed within 180 days after the occurrence of an alleged unlawful practice. In a state such as Pennsylvania which has an agency performing functions similar to those of the EEOC, the time for filing is extended to 300 days or to a period within 30 days of receipt by the individual of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. § 626(d). In view of the circumstance that affidavits submitted by the parties on these initial motions were considered by the district court the Rule 12(b)(6) motions were treated as motions for summary judgment. Nevertheless we will continue to refer to them as motions to dismiss so as to distinguish them from the later motions.

The motions to dismiss were argued simultaneously before the district court which denied them on the authority of our opinion in *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

The *Bonham* case held that the employer's failure to post the notice required by 29 U.S.C. § 627 will result in tolling the running of the limitations period in the EEOC proceedings, at least until such time as the aggrieved person seeks out an attorney or acquires actual notice of his rights under the ADEA, 569 F.2d at 193.

Subsequent to the completion of discovery, defendants moved for summary judgment. In *Callowhill* they alleged that the action was barred by the two-year statute of limitations in 29 U.S.C. § 626(e)(1) and 29 U.S.C. § 255(a) and that the evidence in the record, as a matter of law, could not support a charge of age discrimination. In *Small* and *Martin* the motions for summary judgment were based solely on the statute of limitations.[1] In *Callowhill* the district judge, in an oral opinion, ruled that the evidence was insufficient to support a finding of willfulness and thus the two-year statute of limitations applied. The judge then held that the claim was untimely and, accordingly, he granted summary judgment and dismissed the action. He indicated, however, that he was not "prepared to rule on this record that there is no issue of age discrimination, or to grant summary judgment on that basis." On December 15, 1986, the judge entered an order reflecting this decision.

In the *Small* and *Martin* cases a different judge filed a single written opinion on defendants' motions.[2] He held

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1. Defendants also unsuccessfully renewed their motions to dismiss.

2. *The judge* in the *Small* and *Martin* cases was the same judge who denied defendants' three motions to dismiss.

that plaintiffs had failed to raise a genuine issue of material fact with respect to Allen-Sherman-Hoff's alleged willful statutory violation of the ADEA and, as a result, the two-year statute of limitations applied. The judge then held that notwithstanding Allen-Sherman-Hoff's failure to post the required notice of employee's rights under 29 U.S.C. § 627, the two-year statute of limitations for the court action, as distinguished from the shorter administrative statute of limitations, would not be tolled nor would it be tolled because of Allen-Sherman-Hoff's alleged misrepresentation as to why plaintiffs were discharged. On February 25, 1987, the judge entered an order reflecting this decision. Small and Martin appealed from this order and Callowhill appealed from the order of December 15, 1986.

Plaintiffs contend that the two-year statute of limitations should be tolled by reason of the failure of Allen-Sherman-Hoff to post the notice required by 29 U.S.C. § 627. They further assert that they are entitled to the tolling inasmuch as they were barred by 29 U.S.C. § 626(d) from filing their district court complaints until 60 days after they filed their administrative charges with the EEOC and thus could not bring their district court actions within the two years allowed. Alternatively, plaintiffs argue that the district court erred in finding as a matter of law that Allen-Sherman-Hoff's conduct could not be a willful violation of the ADEA. Defendants, in addition to controverting plaintiffs' contentions, assert that we should affirm the summary judgments as the trial court erred in denying their motions to dismiss predicated on plaintiffs' failure to file timely their administrative charges with the EEOC.

We deal first with defendants' contention that their motions to dismiss should have been granted. It is clear that the timeliness of plaintiffs' administrative charges and their district court complaints must be measured from the time plaintiffs were advised they were to be terminated. *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). Plaintiffs were notified that they were to be terminated in November 1983 and thus the administrative charges were prima facie untimely under 29 U.S.C. § 626 (d) as they were filed in October 1985. Therefore, inasmuch as an individual must bring these charges as a prerequisite to a district court action, ordinarily these cases would be barred. Here, however, the judge denied defendants' motions to dismiss because of Allen-Sherman-Hoff's failure to post the notice required by 29 U.S.C. § 627.

These rulings were correct. The time constraints of 29 U.S.C. § 626(d) are a statute of limitations rather than a jurisdictional prerequisite to filing the charges and thus an individual's failure to file the administrative charges within the period specified in 29 U.S.C. § 626(d) will not necessarily bar a subsequent district court action. *Meyer v. Riegel Prod. Corp.*, 720 F.2d 303, 306-07 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984). Further, as noted by the district judge, an employer's neglect to post the notice required by 29 U.S.C. § 627 will toll the running of the period for filing the administrative charges, at least until the "aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the Age Discrimination in Employment Act." *Bonham v. Dresser Indus., Inc.*, 569 F.2d at 193. Here each plaintiff in response to defendant's motion to dismiss filed an affi-

davit stating that he was unaware of his legal rights under federal and state employment discrimination statutes including the ADEA while employed by Allen-Sherman-Hoff and that he first became aware of these rights on or about October 4, 1985 upon consultation with an attorney.[3]

We are satisfied that defendants' motions for summary judgments predicated on the two-year statute of limitations in 29 U.S.C. § 255, incorporated by 29 U.S.C. § 626(e)(1), should have been denied. It is, of course, clear that the running of the statute of limitations may be tolled by "equitable considerations." *See Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1529 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983). Even if we assume that the district judges had discretion in determining whether to find the statute was tolled, we are satisfied for the

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3. In *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986), the court indicated that there would be no tolling if the employee had general knowledge of his right not to be discriminated against on account of age or the means of acquiring such knowledge. *Id.* at 952. From the employee's viewpoint this is a less generous basis for tolling than that articulated in *Bonham*. Of course, we use the *Bonham* test as it represents the law as determined by this Court. We understand plaintiffs' affidavits to mean that they were unaware of the anti-discrimination laws and procedures and not simply that they were unaware of their own possible bases for charges under the ADEA. Obviously, an employee with full knowledge of anti-discrimination laws and procedures including all information which would be given by a notice posted pursuant to 29 U.S.C. § 627 would not be entitled to a tolling of any limitation period merely because the notice was not posted, as the employer's failure to post the notice would not have prejudiced the employee.

following reasons that it was an abuse of discretion to enter summary judgment for defendants.[4]

When defendants' motions for summary judgment were considered, the district court had denied their original motions to dismiss and thus was treating the administrative proceedings as timely. But plaintiffs, though represented by counsel and aware of their rights under the ADEA within the two-year period set forth in 29 U.S.C. § 626(e)(1), were precluded from filing their district court actions until after they filed their charges of discrimination in October 1985 by 29 U.S.C. § 626(d), which provides that no civil action under the ADEA may be commenced "until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." Thus, unless we hold that the statute of limitations was tolled, plaintiffs' putative actions, though not yet filed or barred were doomed when they filed their administrative charges.[5] Yet Allen-Sherman-Hoff must, as a mat-

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4. While the parties have stated that our standard of review is the same as the district court utilized initially, that is whether viewing the evidence and inferences most favorably to plaintiffs defendants are entitled to judgment as a matter of law (*See Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985)), this conventional formulation may be inadequate here as this case involves an equitable determination after the operative facts are established. Thus we have also considered this case under the abuse of discretion standard. *See E.E.O.C. v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 81 (3d Cir.), *cert. dismissed*, 469 U.S. 925 (1984).

5. Defendants contend that under 29 U.S.C. § 633(b) the actions should not have been brought until the expiration of 60 days after the commencement of the Pennsylvania administrative proceedings and thus should be deemed to have been

(Continued on following page)

ter of law, at least at this stage of the proceedings involving review of orders on pretrial motions, be held to have contributed to this situation by its failure to post the notices required by 29 U.S.C. § 627, thereby delaying the filing of plaintiffs' administrative charges. Accordingly, plaintiffs should be permitted to prosecute their actions provided this can be equitably done taking into consideration defendants' rights to repose under the statute of limitations.

The statute of limitations is important to a defendant to protect it from the unfair surprise of a stale claim. *See Kreiger v. United States,* 539 F.2d 317, 322 (3d Cir. 1976). Under the unique facts here, it would no do violence to this policy to toll the statute as Allen-Sherman-Hoff, by reason of the service of the Notices of Charges of Discrimination in October 1985, knew of plaintiffs'

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filed at the expiration of the 60-day period, rather than on December 9, 1985. We reject this contention because regardless of the propriety of their doing so, plaintiffs in fact brought their actions on December 9, 1985 and there is no indication in the record that defendants moved to dismiss the district court actions as premature even though they made reference to the requirements of 29 U.S.C. § 633(b) in their district court briefs filed on the motions to dismiss. Perhaps there was no such motion because defendants expected that if they so moved the cases would be held "in abeyance" until the 60 days ran. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 764-65 (1979). In any event in the absence of such a motion we see no reason to consider the possibility of plaintiffs obtaining relief under Pennsylvania law. *See Slenkamp v. Borough of Brentwood,* 603 F.Supp. 1298, 1302-03 (W.D. Pa. 1985), *aff'd,* 826 F.2d 1057 (3d Cir. 1987). We further point out that Martin apparently brought this action before the expiration of the 60-day preclusion period in 29 U.S.C. § 626(d)(1). Defendants, however, do not rely on this to uphold the result in the trial court and thus we do not consider the consequence of this seemingly premature filing.

claims before the two-year statute ran. Thus, we are satisfied that a weighing of the equitable considerations in these cases requires that the statute of limitations be tolled and plaintiffs' complaints be considered timely. Accordingly, the judges erred in granting defendants' motion for summary judgment.

We think it important to point out the limitations of our opinion. Our result is based on the coincidence of the circumstances that: (1) the district court did not err in denying defendants' original motions to dismiss; (2) the charges were filed promptly with the EEOC after plaintiffs retained counsel; (3) the charges were filed at a time when the 60-day deferral provisions of 29 U.S.C. § 626(d) made it too late for plaintiffs properly to file their district court complaints within two years after the occurrence of the alleged unlawful action; and (4) the defendants were aware of the charges within two years of the accrual of the plaintiffs' causes of action. Thus, we do not suggest that if plaintiffs had been aware of their potential claims beyond the period for filing timely EEOC charges, but early enough so that 60 days after filing the charges they could have brought these actions within the two-year limitations period, we would have reached the same result. To the contrary, it is difficult to perceive what equitable considerations in those circumstances could justify a tolling as defendants' failure to post the notices could not then be held to have required that the district court action be brought in an untimely fashion.

We further note that we do not suggest that our result would have been the same if Allen-Sherman-Hoff had not been aware of plaintiffs' claims within two years

after plaintiffs were notified they were to be discharged. While in that circumstance the equities in favor of a plaintiff might be no less than those here, a court, aware of its obligation ordinarily to apply a statute of limitations (*see School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981)), might hold the action barred as the employer would have more of a basis to claim a right of repose than defendants here. Thus, we conceive that an individual might become aware of his rights under the ADEA too soon or too late to benefit by our result. Indeed, in our view this case falls within a narrow corridor through which plaintiffs may safely pass.

We also point out we do not decide with respect to these particular cases. The matters are before us on plaintiffs' appeals from the granting of defendants' motions for summary judgment and, in addition, from the district court's denial of defendants' motions to dismiss which, as we have indicated, were treated as motions for summary judgment.[6] We are only holding that the original motions were properly denied and that the second motions should have been denied. Finally, in view of our result, we do not reach plaintiffs' contentions that the three-year statute of limitations is applicable in these cases.

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6. Defendants appropriately raised this issue without a cross-appeal. *See Lucas v. Gulf & W. Ind. Inc.*, 666 F.2d 800, 805 (3d Cir. 1981).

The orders for summary judgment will be reversed and the matters will be remanded to the trial court for further proceedings consistent with this opinion.[7]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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7. It should not be inferred that we have implied any opinion as to the merits of this case.